Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF RESPONDENT JAMES E. BAGGOT, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INTRODUCTION.

Petitioner's arguments are baseless. The arbitration engaged in was not compulsory, as he contends, but rather voluntarily invoked by him; and every court, state and federal, which has reviewed the record of those proceedings[1] has found petitioner's

1. Rosee originally filed suit in the Superior Court of Cook County, Illinois, but took a voluntary non-suit after his request for

(Footnote continued on next page.)

charges of unfairness to be without merit. In any event, no federal question is present here, for the proceedings at the Board of Trade, a private association, do not constitute state action.

Moreover, petitioner has completely misstated the holding of the Illinois Appellate Court, from which he seeks to appeal. That Court did not hold, as he asserts, that the determination by the Board of Trade's arbitration panel was conclusive. What it held was that, as to those parties who participated in the arbitration proceeding, the Committee's determination was binding, unless it was tainted with fraud or unfairness; but that the record did not establish fraud or unfairness. (See Appendix, pp. 50a,

(Footnote **continued from preceding page.**)
an injunction compelling reinstatement to the Board of Trade *pendente lite* was denied. He next filed suit in the United States District Court, Northern District, Illinois, alleging denial of due process and equal protection and an implied cause of action under the Commodities Exchange Act. The action was dismissed on grounds that Rosee had not asserted a valid claim based on violation of federal rights. The Court of Appeals for the Seventh Circuit affirmed (311 F. 2d 524 (7th Cir. 1963)), and this Court denied certiorari (374 U. S. 806 (1963)).

Rosee then filed suit in the Circuit Court of Cook County. Because he named two employees of the Commodities Exchange Authority as alleged co-conspirators, the case was removed to the United States District Court once more. There, in a 76 page opinion, Judge Will found no evidence of a conspiracy involving the two agents and ordered summary judgment (No. 63 C 1348 (N. D. Ill. 1966)). He ordered the case remanded to the Circuit Court of Cook County as to the other defendants. Judge Will's opinion was affirmed by the Court of Appeals for the Seventh Circuit (Appeals No. 15886 and 16373) and this Court again denied certiorari (393 U. S. 1055 (1969) and rehearing (393 U. S. 1124 (1969)).

In the instant case, besides the trial in the Circuit Court of Cook County, and the decision by the Illinois Appellate Court, the Illinois Supreme Court has denied leave to appeal. Subsequently, Rosee has sought to reopen the case by several procedural devices in the Illinois trial and appellate courts, and the United States District Courts for the Northern District of Illinois and for the District of Columbia. (See *Rosee* v. *Bergland,* Civil No. 76-1721, dismissed April 26, 1977.)

Obviously, Rosee "has had his day in Court." Memo Order, p. 5, *Rosee* v. *Bergland, supra.*

51a, 64a) As to the non-participants, such as the respondent Baggot, the Appellate Court gave no binding effect at all to the arbitration finding, but it again found that there was no evidence of fraudulent conduct on their part—and certainly no "clear and convincing" evidence.[2] (See Appendix pp. 64a-65a)

2. The quantum of proof for fraud and conspiracy in Illinois has always been "clear and convincing evidence." e.g., *Bundesen* v. *Lewis,* 368 Ill. 623 (1938); *Tribune Co.* v. *Thompson,* 342 Ill. 503 (1930).

PETITIONER'S STATEMENT OF THE CASE.

The factual statements made by petitioner Rosee are for the most part grossly inaccurate. For the most part, they are bald allegations, without any citation to the record. Some of these matters are treated in our argument and, rather than be repetitious, we have not cited them here. As to some of the other more flagrant misstatements of the record, we briefly note:

(1) Petitioner asserts that worksheets supplied by Baggot & Morrison were fraudulently prepared a few days before the arbitration hearing. (Pet. Cert. 14) The Illinois Appellate Court notes, however (App. p. 54a), that Rosee has confused the "worksheets" with a compilation therefrom made by bookkeeper Haywood a few days before the hearing. The Court found "no evidence of fraudulent preparation as to any of the *actual worksheets.*" (App. 54a) (Emph. ours)

(2) Rosee asserts that his position cards and the worksheets show great disparities. (Pet. Cert. 14) Here again, the Appellate Court, in an exhaustive opinion, demonstrates that this charge is due to Rosee's misreading the position cards to reflect the closing position of a trader for the date *prior* to the one stamped on the card, rather than the closing position for the stamped, or proper date. (App. p. 55a)

(3) Rosee asserts that important P & S slips were removed from Baggot & Morrison records (Pet. Cert. 13) The Appellate Court found that the alleged missing slips involved *oat* transactions, a commodity which Rosee never traded in. Obviously, none of the missing slips could have been his. (App. p. 61a) And quite properly, the Appellate Court on this question found "there is no transaction before us and no claim advanced by plaintiff as to which absence of a P & S slip had any material effect." (App. p. 61a)

(4) Petitioner asserts that missing daily segregation records were essential to show his true position day by day. (Pet. Cert. 12) However, these sheets showed only the identity of individual customers who were in a *debit* position at the end of the day, *not those with credits.* The guts of Rosee's claim is that he had a *credit.* Moreover, the records were cumulative of other documents and, as the Appellate Court properly noted, their disappearance over more than a decade of litigation between state and federal courts is not sufficient to establish fraud. (App. p. 60a)

I.

PETITIONER'S PARTICIPATION IN THE ARBITRATION PROCEEDING WAS COMPLETELY VOLUNTARY, NOT COMPULSORY, AS HE ALLEGES.

The thrust of petitioner's argument is that under the Rules of the Board of Trade, submission of the controversy in question to an arbitration panel was "compulsory" or "mandatory" (Pet. Cert. pp. 18, 19, 25), and binding. The evidence speaks otherwise:

> (1) The Board of Trade is a voluntary association incorporated under a special legislative charter in the State of Illinois.

By its charter, the Board is empowered (*inter alia*) to:

> (a) establish such rules, regulations and by-laws for the management of its business, and the mode in which it shall be transacted, as the Board may think proper. (Bd. of Tr. Ex. 1, § 4)
>
> (b) admit or expel such persons as the Board may see fit, in a manner to be prescribed by rules, regulations and by-laws thereof. (§ 6)
>
> (c) constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as

may be prescribed in the rules, regulations and by-laws for the settlement of such matters of differences as may be *voluntarily submitted* for arbitration by members of the Association. (§ 7) (*Emph. added*)

(2) Petitioner applied for and was admitted to membership on the Board of Trade in 1944, at which time he expressly agreed to abide by the rules and regulations of the Association. (A. 4, 1380)

(3) Board of Trade Rule 130 provided that:

> "Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied . . . If the member alleged to be in default denies the default, *he shall be entitled to have the claim arbitrated*. If the claim is admitted or established by a final arbitration award, the defaulting member shall be suspended until he has satisfied and discharged all debts owing to members on exchange contracts. . . ." (Bd. of Tr. Ex. 1) (*Emph. added*)

With this backdrop,

(4) In June of 1960, respondent Morrison filed a $13,654.41 claim against Rosee with the Board of Trade. This allegedly represented Morrison's one-half interest in the amount Rosee owed the firm of Baggot & Morrison at the time it dissolved.

(5) Rosee was notified of Morrison's claim (Bd. of Tr. Ex. 2; A. 1382-83) and on June 10, 1960, he responded to the Secretary of the Board of Trade, requesting arbitration of Morrison's claim. His letter read:

"June 10, 1960

Mr. Warren W. Lebeck, Secretary
Board of Trade Building
Chicago 4, Illinois

Dear Mr. Lebeck:

Your letter of June 8, 1960 has been received.

In regard to this matter *I request that this be referred to the Arbitration Committee* of the Chicago Board of Trade as there are certain circumstances pertaining to this claim that should be arbitrated.

Sincerely,

Bernhard Rosee."

(Bd. of Tr. Ex. 3; A. 1383) (*Emph. added*)

(6) On July 19, 1960, Rosee and Morrison signed a document formally notifying the Board of Trade that the services of the Committee on Arbitration were requested to resolve a dispute between them. (Bd. of Tr. Ex. 4; A. 1383-84)

(7) Rosee and Morrison also signed an agreement *voluntarily* submitting their differences to arbitration before the Board's Committee on Arbitration. Indeed, the document recited that arbitration was invoked to "avoid proceedings in the courts." (Bd. of Tr. Ex. 5; A. 1384-85)

(8) Hearings were held on July 26, August 9 and 23, October 4, 7, 12, 18, 20 and 28 and on November 21, 60. (Arb. Tr.) Rosee has never claimed that he was suspended from trading during this time, nor is there anything in the record indicating that he was. (e.g. A. 1387)

(9) In early October, at a meeting of the Committee on Arbitration, petitioner filed a counter-claim against Morrison for $44,537.75. (Arb. Tr. 266-69; Bd. of Trd. Ex. 6)

However, on November 15, 1960, Rosee wrote to the Committee and advised that he was withdrawing this claim "upon the advice of counsel, *to litigate this matter in the proper court.*" (Bd. of Tr. Ex. 6; A. 1385-86) (*Emph. added*)

(10) On December 16, 1960, the Committee on Arbitration rendered an award for Morrison in the amount of $11,323.78 ($2,330.63 less than he claimed). (Bd. of Tr. Ex. 7; A. 294-96; 1386)

(11) On December 28, 1960, Rosee appealed to the Board of Trade Committee on Appeals. On February 15, 1961, that committee affirmed the Arbitration Committee's award. (Bd. of Tr. Ex. 8; A. 297; 1386)

(12) Rosee refused to pay the award, and, pursuant to Board of Trade Rule 130, he was suspended from membership on February 28, 1961, effective March 1, 1961. (Bd. of Tr. Ex. 9; A. 1387)

(13) Finally, on July 2, 1963, upon Rosee's continued refusal to pay the award, the Board of Trade, pursuant to Rule 123 (Bd. of Tr. Ex. 1; A. 14; 277), caused the sale of Rosee's membership.

Had Rosee used his money to pay the award rather than the fees of more than 30 lawyers (to date), he would still have his seat on the Board and still be free to engage in his favorite pastime of litigating this case. At any rate, it is clear that petitioner was not compelled to seek arbitration.

II.

PETITIONER'S CLAIM THAT THE ARBITRATION PROCEEDINGS DENIED HIM DUE PROCESS IS COMPLETELY WITHOUT BASIS.

In the first place, petitioner fails to demonstrate any state action which allegedly deprived him of due process of law. The Board of Trade is a purely private association, not vested with

any public function, nor intertwined with the federal or state governments. *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972); *Rosee* v. *Board of Trade*, 311 F. 2d 524 (7th Cir. 1963). The mere fact that the Board of Trade is subject to governmental regulation does not transfer the rules it promulgates from purely private to state action. *Moose Lodge* v. *Irvis, supra.* In today's society, all human behavior is subject to government regulation, state or federal.

The cases relied upon by petitioner, *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963) and *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973), are completely inapposite. Both arose under federal statutes (Sherman Anti-Trust and Commodities Exchange Act). Rosee must, however, establish a violation of constitutional right by state action to invoke this Court's jurisdiction. This he has not done.

Rosee's contention that he has been denied due process is strained at the utmost. He argues, in direct conflict with the record and in total disregard or misstatement of the holding of the Illinois Appellate Court, that that Court concluded that the decision of the Arbitration Committee of the Board of Trade back in 1961 was final and binding, even if it was arbitrary and discriminatory, and its findings in consequence not appealable. Further, he asserts that by denying his petition for leave to appeal from the adverse ruling of the Appellate Court, the Illinois Supreme Court denied him due process.

In the first place, the fact that Rosee is here petitioning for certiorari from the courts of review of Illinois refutes his contention that any court in Illinois held that the arbitration panel's decision was final and unappealable, even in the absence of fraud, unfairness or injustice. The Appellate Court's opinion plainly holds that the arbitration decision may be reviewed by courts and overturned on a finding of fraud, corruption or undue means. (See specifically App. p. 51a)

Second, we must presume that the Illinois Supreme Court, in denying his petition for leave to appeal, has considered all issues

raised, and that denial is, in effect, tacit approval of the Appellate Court's decision. If every denial of a petition for leave to appeal would suggest denial of due process, this Court would be busy indeed with the many petitions from the 50 states. In sum and short, the mere fact that the courts of review do not agree with a litigant is not a denial of due process. Yet, the effect of Rosee's brief states nothing more.

As to Rosee's specific claims of unfairness, without unduly burdening the Court with references to the petitioner's erroneous statements, we cite only a few instances of Rosee's gross disregard for the evidence.

(1) Rosee alleges that he was fraudulently induced to submit to arbitration by a promise of the Secretary of the Board of Trade that he would be furnished all of the records and documents he requested. (Pet. Cert. 7) But, according to the records, Rosee's request for arbitration preceded Secretary Lebeck's letter by a full month, so he could not have been "lulled" into arbitration by such inducement. (App. 39a) By the way, his "inducement" argument is inconsistent with his major argument that arbitration was compulsory and mandatory, and foisted upon him.

Also, the Arbitration Committee required that the parties' requests for documents be specific. (Arb. Tr. 179) It ordered Morrison to provide Rosee with all documents specifically requested, pursuant to its ruling. (*e.g.*, Arb. Tr. 116; A. 296) If Rosee did not get documents he now finds reason to complain of, it is because he did not make a specific request. This is un..ssailable.

(2) He also alleges that the arbitration was unfair because Mr. Morrison had the benefit of advice by Mr. Coughlin, a Board member and attorney, and he had no such help. (Pet. Cert. 7) The ruling of the Board of Trade limiting participation of attorneys to members of the Board did not deny Rosee the opportunity to seek the assistance of other

lawyer members. But, in any case, the record shows that Rosee had the assistance of counsel, if not at the hearings themselves, at least in preparation for them, for he conceded, for example, that he withdrew his counter-claim against Morrison "on the advice of counsel." (Arb. Tr. 502; Bd. of Tr. Ex. 6; A. 1385-86)

(3) His contention that the Committee refused to subpoena documents and witnesses is equally baseless. (Pet. Cert. 7) On one occasion, Rosee asked the Committee to call a Mr. Edwards, apparently as a Committee witness. The Committee told Rosee that it would not call Edwards as its own witness unless it could be shown that the witnesses' testimony would be of value, but that Rosee was free to call Mr. Edwards himself. (Arb. Tr. 212-13)

On one other occasion, the Committee denied Rosee's motion for production of certain bank records, apparently on grounds that they were irrelevant. (Arb. Tr. 209-11) These two incidents, the only ones cited by petitioner, hardly support a conclusion that the Committee refused Rosee the right to subpoena books, records and witnesses.

(4) Rosee's bald assertion that he was denied the right to file a counter-claim (Pet. Cert. 7) is at odds with his own testimony and the arbitration record. In fact, Rosee sent a letter requesting a counter-claim against Morrison. (Arb. Tr. 126) The Committee's Secretary stated that the request would be considered at the next meeting, and pointed out to Rosee that Morrison would have to approve submitting the claim to arbitration (since the rules did not make arbitration mandatory, but allowed for it only by agreement of both parties). (Arb. Tr. 270) Before the request was made to Morrison, and before a ruling was ever made by the Committee, Rosee, of his own volition, withdrew the request for a counter-claim "on the advice of counsel." (Br. of Tr. Ex. 6; A. 1385-86)

> (5) Finally, petitioner says he was summarily denied an appeal by the Committee on Appeals without time to prepare. (Pet. Cert. 7) There is absolutely no evidence in the record to support this contention. The evidence showed that he perfected an appeal on December 28, 1960, and the Committee had the case for consideration for almost a two month period, before affirming the Committee on Arbitration's decision. (Bd. of Tr. Ex. 8; A. 297; 1386)

Even if the Arbitration Committee and the Appeals Board had acted in the arbitrary, unjust and fraudulent manner Rosee ascribes to them, the fact remains that all of his grievances have now been aired in the highest courts of Illinois, the federal courts, and before various administrative tribunals. After all is said and done, the fact remains that the record abounds with evidence of full and impartial review of the arbitration hearings by the courts. What we have here is merely a litigant dissatisfied with the decisions of these courts of review who seeks somehow to elevate all that into a claim of constitutional deprivation.

CONCLUSION.

Rosee has not shown any valid reason why this Court should take jurisdiction. His due process arguments are a strained assortment of mis-statements of law and of the record. He has made the same arguments for twenty years to both the state and federal courts. They contain no more merit now than when made before.

Respondent James E. Baggot respectfully urges that Rosee's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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